DIVISION III
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, Judge

CA06-572

February 14, 2007

MICHAEL ROSE D/B/A BESTWAY PAWN & USED CARS, INC.
APPELLANT

v.

MIKE W. FORD
APPELLEE

AN APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CV-2005-13808]

HONORABLE TIMOTHY FOX, JUDGE

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

BRIAN S. MILLER, Judge

In this one-brief appeal, appellant Michael Rose, individually and doing business as Bestway Pawn and Used Cars, Inc., appeals the entry of default judgment against him in a breach-of-contract and business-fraud action filed by Mike Ford in the Pulaski County Circuit Court. In the judgment, the trial court ordered Rose to return the following to Ford: (1) the business name; (2) the business phone number; (3) the customer list; and (4) all other property associated with Bestway Pawn and Used Cars. The trial court also ordered Rose to immediately cease all use of the business name and property. The trial court stated that the issue of monetary damages would be determined at trial. On appeal, Rose argues that the trial court erred when it granted Ford injunctive relief and when it granted the default

judgment. We affirm the grant of default judgment and reverse and remand the grant of injunctive relief.

On August 1, 2004, Mike Ford and Rose, individually and d/b/a Bestway Pawn and Used Cars, Inc., entered into an agreement by which Ford sold to Rose the name Bestway Pawn and Used Cars. In the agreement, Ford agreed not to contest the incorporation of a business using the name Bestway Pawn and Used Cars, to relinquish any rights or license to the continued use of the business telephone number and to assist in transferring the number to Rose, and to deliver all existing customer information to Rose. Ford also agreed to pay Rose five percent of all sums collected by Rose from Ford's unpaid accounts receivable, and Ford agreed to pay Rose twenty percent of the gross profit from the sale of Ford's merchandise and cars. Rose agreed to pay $5000 to Ford at closing.

At the time of their agreement, Rose and Ford also entered into a lease agreement. The lease provided that Rose would lease 4717 W. 65th Street, Little Rock, Arkansas, for five years and would pay Ford the sum of $1200 per month plus twenty percent of the gross profits earned from pawn and car sales.

On October 26, 2005, Ford filed a complaint alleging that Rose had breached the agreement and lease by failing to pay rent, by using the business for unlawful purposes, and by failing to comply with city, state, and federal laws. In his prayer for relief, Ford sought at least $67,659.30 in monetary damages plus attorneys' fees. He also prayed for restoration of the business name, phone number, customer lists, and property of Bestway.

Rose filed an answer, twenty-three days after service, on November 18, 2005. Ford moved for default judgment on December 5, 2005. He alleged that Rose had failed to file a timely answer. In his response to the motion for default judgment, Rose admitted that his answer was two days late. He argued that Ford was not entitled to default judgment because: (1) there was an answer on record evidencing Rose's appearance and defense of the case; (2) his answer was untimely due to excusable neglect; and (3) he had a meritorious defense on the merits.

A hearing on the motion for default judgment was held on January 24, 2006. At the conclusion of the hearing, the trial court granted Ford's motion for default judgment. Prior to the trial court filing its judgment, Rose filed an objection to the proposed judgment because it allowed Ford to recover non-monetary relief that Ford did not allege in his complaint. The trial court did not address Rose's objection and default judgment was entered on February 17, 2006. From that judgment, Rose filed a timely notice of appeal.

Although not addressed by Rose, we must first address whether we have a final appealable order. With the exception of those orders listed as immediately appealable under Ark. R. App. P. – Civ. 2, an appellate court's jurisdiction is not invoked until a final order has been entered. *See Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003). The question of whether an order is final and subject to appeal is a jurisdictional question that the appellate court will raise sua sponte. *See Farm Bureau Mut. Ins. v. Running M Farms, Inc.*, 348 Ark. 313, 72 S.W.3d 502 (2002). As a general rule, a judgment or order

is not final and appealable if the issue of damages remains to be decided. *Israel v. Oskey*, 92 Ark. App. 192, ___ S.W.3d ___ (2005). Furthermore, it has been held that an appeal from a default judgment on liability should be dismissed where there was a failure to timely answer and the issue of damages was not yet resolved. *Id*.

Rule 2(a)(6) of the Arkansas Rules of Appellate Procedure – Civil permits appeals from interlocutory orders by which an injunction was granted. Because the order appealed from enjoined Rose from further using the business name, business phone number, customer lists, and any property associated with Bestway Pawn and Used Cars, we have an order granting injunctive relief. Therefore, we have a final order and jurisdiction over the question of whether the injunctive relief conferred by the trial court was proper. Because we have jurisdiction to decide whether the grant of injunctive relief was proper, we can also review whether the trial court erred when it granted Ford's motion for default judgment.

Rose first argues that the trial court erred in granting Ford injunctive relief. The decision to grant or deny an injunction is within the discretion of the trial court. *Doe v. Ark. Dep't of Human Servs.*, 357 Ark. 413, 182 S.W.3d 107 (2004). We review a trial court's grant of injunctive relief de novo. *Emerald Dev. Co. v. McNeill*, 82 Ark. App. 193, 120 S.W.3d 605 (2003). However, when considering an order that grants or denies an injunction, the appellate court will not delve into the merits of the case further than is necessary to determine whether the trial court exceeded its discretion. *Doe*, *supra*.

In order to be entitled to equitable relief, a party must show a lack of an adequate

remedy at law. *American Investors Life Ins. Co. v. TCB Transp.*, 312 Ark. 343, 849 S.W.2d 509 (1993). The prospect of irreparable harm or lack of an otherwise adequate remedy is at the foundation of the power to issue injunctive relief. *Compute-A-Call, Inc. v. Tolleson*, 285 Ark. 355, 687 S.W.2d 129 (1985). Harm is considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Id*.

Rose contends that the grant of equitable relief was error because Ford did not request equitable relief and his complaint failed to make allegations that would support a grant of equitable relief. It is well settled that the statement of facts in a complaint or cross-complaint, and not the prayer for relief, constitutes the cause of action, and that the court may grant whatever relief the facts pleaded and proven may warrant, in the absence of surprise to the complaining party. *Jackson v. Jackson*, 253 Ark. 1033, 490 S.W.2d 809 (1973); *Shick v. Dearmore*, 246 Ark. 1209, 442 S.W.2d 198 (1969); *Taylor v. Taylor*, 224 Ark. 328, 273 S.W.2d 22 (1954). Moreover, a judgment by default must strictly conform to, and be supported by, the allegations of the complaint, and a closer correspondence between the pleading and judgment is required than would be after a contested trial. *Kohlenberger v. Tyson's Foods*, 256 Ark. 584, 510 S.W.2d 555 (1974).

Ford requested equitable relief in his prayer for relief; however, the question before us now is whether the facts pleaded in Ford's complaint supported a cause of action for equitable relief. Upon close inspection of Ford's complaint, we hold that the complaint did not make out a cause for equitable relief. The complaint is devoid of any facts showing that

the harm suffered by Ford was irreparable, and it is clear that he sought only monetary damages for which there is an adequate remedy at law. Therefore, we hold that the trial court erred when it granted Ford equitable relief by entry of a default judgment and thereby reverse and remand this issue to the trial court.

Rose also argues that the trial court erred when it granted the default judgment. Rule 55 of the Arkansas Rules of Civil Procedure provides that when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the Rules of Civil Procedure, a default judgment may be entered against him. *See also Israel v. Oskey*, *supra*. The standard by which we review the granting of a default judgment and the denial of a motion to set aside the default judgment is whether the trial court abused its discretion. *Jurisdictionusa, Inc. v. Loislaw.com*, 357 Ark. 403, 183 S.W.3d 560 (2004).

Rose fails to demonstrate that the trial court abused its discretion when it granted Ford's motion for default judgment. We, therefore, affirm the trial court's grant of default judgment on all matters other than the injunction.

Affirmed in part; reversed and remanded in part.

ROBBINS and GLOVER, JJ., agree.